11-20-2008

TENNESSEE DEPARTMENT OF AGRICULTURE, Petitioner, vs. JEFF BROUSAL, Grievant.

BEFORE THE TENNESSEE CIVIL SERVICE COMMISSION

TENNESSEE DEPARTMENT OF AGRICULTURE,	)
Petitioner,	)
	)
v.	) **Docket No. 26.01-099709J**
	)
JEFF BROUSAL,	)
Grievant.	)

INITIAL ORDER

This contested case came on to be heard on November 20, 2008, in Nashville, Tennessee before Administrative Judge Joyce Grimes Safley, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Civil Service Commission of Tennessee. Ms. Theresa Denton, General Counsel for the Department of Agriculture, represented the Department of Agriculture (hereinafter "the Department"). The Grievant, Dr. Jeff Brousal, was present and represented himself *pro se.*

The parties submitted their respective "Proposed Findings of Fact and Conclusions of Law" on December 11, 2008 and February 23, 2009, making this matter ripe for consideration[1].

The subject of this hearing was Grievant's appeal of his ten day suspension, without pay, from the Department of Agriculture. Grievant was given the ten day suspension for allegedly violating the following *Rules of the Tennessee Department of Personnel* (Revised May, 1999): Rule1120-10-.06(2)

[1] It is noted that the Initial Order in this matter is due for issuance on or before ninety (90) days from the date the parties' proposed findings of fact and conclusions of law were filed. The transcript was filed on January 22, 2009. Thereafter, the Department filed its "Proposed Findings of Fact and Conclusions of Law" on February 23, 2009. The Initial Order in this matter is due on or before May 25, 2009. *See* T.C.A. § 4-5-314.

Negligence in the performance of duties, and Rule 1120-10-.06(8) Conduct unbecoming an employee in the State service.

The Department also alleges that Grievant's acts or omissions were causes for disciplinary action against Grievant because they fell within the categories set forth in Rule 1120-10-.01(45) of the *Rules of the Department of Personnel*. Rule 1120-10-.01(45) provides that causes for disciplinary action fall into two categories: (1) Causes relating to performance of duties and (2) Causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job.

After consideration of the testimony and evidence presented, the arguments of counsel, and the entire record in this matter, it is determined that the Department showed, by a preponderance of the evidence, that Grievant was guilty of Rule 1120-10-.06(2) - Negligence in the performance of duties, and Rule 1120-10-.06(8) - Conduct unbecoming an employee in the State service. The Department also showed that Grievant's acts or omissions were causes for disciplinary action against Grievant because they fell within the categories set forth in Rule 1120-10-.01(45) of the *Rules of the Department of Personnel*.

Accordingly, considering all the facts and circumstances of this matter, it is **ORDERED** that the appropriate discipline in this matter is **ten (10) days suspension without pay.**

FINDINGS OF FACT

1. Grievant was hired by the Tennessee Department of Agriculture in August, 2004 as a "Chemist 2."

2. Grievant's supervisor, at all relevant times, from the time of hire through the time of the contested case hearing was Dr. Pampa Chakrabarti.

3. Grievant's supervisor, Dr. Chakrabarti, has a B.S. degree in Chemistry, a M.S. degree in Biochemistry, and a Ph.D. in Biochemistry.

4. Dr. Chakrabarti's duties include supervising Grievant's work, doing "bench work", and performing any chemical analysis work assigned to the Department's Toxicology Section.

5. Dr. Chakrabarti's division analyzes animal tissues, blood, food samples, soil, water, or any other materials which may be related to an animal's health or sickness. Usually the request for a toxicology analysis comes from a veterinarian. The veterinarian generally sends tissue or samples to the Toxicology Division along with a request for analysis.

6. Grievant's work as a "Chemist 2" is mostly "bench work", or performing chemical analyses requested of the Toxicological Section of the Department.

7. When Grievant first began working at the Department as a "Chemist 2", he received a "superior" rating on his April 19, 2005 "probationary" evaluation. Dr. Chakrabarti noted that he was an "energetic, hard-working employee, and an asset to the laboratory."

8. After the April 19, 2005, Dr. Brousal's work became sloppy, his attendance became irregular, and there were times he was not available in the laboratory.

9. Dr. Chakrabarti discovered, after the first evaluation, that Dr. Brousal did not always follow the laboratory procedures the way they should be followed.

10. Dr. Chakrabarti issued a "written warning" to Dr. Brousal on August 24, 2006 concerning his unavailability at work, excessive breaks, and speaking to Dr. Chakrabarti in a "mocking" way. When Dr. Chakrabarti talked to the "Feed Section Supervisor" about the procedure that should have been followed, and followed up with Dr. Brousal, Dr. Brousal became upset and told Dr. Chakrabarti: "I am not your servant, I am a professional." Dr. Brousal then threw away papers and stated that he was leaving work.

11. After the written warning of August, 2006, Grievant's behavior and work improved for a while.

12. Thereafter, Dr. Brousal's work had its ups and downs.

13. A December, 2006 evaluation noted that Dr. Brousal's work had improved, and his "overall job performance is good."

14. In August, 2007, Dr. Chakrabarti issued a "nonconformance report" for Dr. Brousal's performance of an arsenic toxicology and monitoring test. According to the report, Dr. Brousal did not use the proper pipette for performing the chemical testing and analysis.

15. Dr. Chakrabarti noted, in an August, 2007 email to her supervisor, James McGuire, that Grievant was acting "unprofessionally." Dr. Chakrabarti questioned Grievant's "scientific ethics" and the quality of Dr. Brousal's work.

16. Dr. Chakrabarti testified that at the time of the August 2007 email, Dr. Brousal was having a problem with dropping his children off at school in

the morning, and picking them up from school in the afternoon. Consequently, Dr. Brousal came into work late, and left from work early.

17. On March 4, 2008, Dr. Chakrabarti wrote Dr. Brousal a memorandum. In the memorandum, Dr. Chakrabarti wrote:

> I instructed you several times before and like to remind you again that you should not dispose of any sample extract or intermediate sample preparation until the results of the analysis are finalized and reported to the LIMS.
>
> Also, you should properly label all dilution/extraction tubes/vials/flasks, et cetera, for your or other analysts' work.

18. Dr. Chakrabarti wrote Dr. Brousal the March 4, 2008 memorandum because she had discovered that he was not keeping intermediate extracts as instructed. Rather, Dr. Brousal was disposing of the extracts. Disposal of the intermediate extracts meant that if there was any question arising regarding the sample analysis, it would not be possible to check the results or analyze them again.

19. On March 19, 2008, Dr. Chakrabarti was working with toxicology samples. When she went to put her sample in the centrifuge, she found tubes which Grievant Brousal had placed into the centrifuge machine and left unattended. One of the tubes in the centrifuge had cracked and had liquid dripping from it. Dr. Chakrabarti discovered that the cracked tube contained an animal's stomach contents and a solvent.

20. Dr. Chakrabarti knew that Dr. Brousal was testing the stomach contents for pesticides. When she did not find Dr. Brousal, she took the tube out. The cracked tube was a polystyrene tube.

21. Dr. Chakrabarti explained that the proper procedure would have been to receive a sample, put the sample in a glass (not polystyrene) tube, and then add a solvent, such as Hexane. The polystyrene tube could not tolerate the presence of the solvent (Hexane) and the steaming while in the centrifuge.

22. After finding the cracked tube in the centrifuge, Dr. Chakrabarti looked for Dr. Brousal, whom she found in the "break room".

23. Dr. Chakrabarti asked Dr. Brousal, "Why did you do it? You are a Ph.D."

24. According to Dr. Chakrabarti, Dr. Brousal began "yelling" at her, and said, "Don't put sh*t on me."

25. Later, during the exchange, Dr. Brousal told Dr. Chakrabarti she was "f**king crazy."

26. Dr. Chakrabarti was very upset and "shaken" because no one had ever said such an expletive to her.

27. Dr. Chakrabarti wrote down the exchange with Dr. Brousal and sent it to her supervisor, Mr. McGuire. She also stated that she did not wish to supervise Dr. Brousal any more.

28. Dr. Chakrabarti's testimony is deemed credible.

29. Mr. McGuire is the Chemical Branch Manager for the Department of Agriculture. He oversees the supervisors in the laboratories, and also acts as a liaison between the laboratory and the customers.

30. Mr. McGuire testified, credibly, that while at times Dr. Brousel has been a good employee and been pleasant, Grievant has also had "moments of insubordination, using foul language, sloppy work."

31. Mr. McGuire related that he had given Grievant verbal warnings for errors in his laboratory notebook and using offensive language. The "verbal warnings" were documented by Mr. McGuire with notes.

32. Mr. McGuire learned of the March 19, 2008 confrontation between Dr. Chakrabarti and Grievant from both parties. Dr. Chakrabarti discussed it with him, and similarly, Dr. Brousal went to Dr. McGuire's office to report that he had had an altercation with Dr. Chakrabarti.

33. When Mr. McGuire learned of the March 19, 2008 incident, he instructed Dr. Brousal to finish the testing before he left for the day.

34. Dr. Brousal left without finishing the test on the sample. Dr. Chakrabarti completed the test for him.

35. Mr. McGuire observed that "Jeff [Brousal] is very resistant to authority, and he doesn't seem to like anyone in an authority position. He constantly bends the rules, breaks the rules any time when he gets an opportunity, when he thinks somebody's not looking."

36. Mr. McGuire testified that he believed the ten day suspension for Grievant was appropriate because it was the third incident of Grievant's using foul and abusive language at work, Grievant's being insubordinate to his supervisor, and Grievant's being "sloppy" in his work at times.

37. Dari Shadwick, a Computer Technician with the Tennessee Department of Agriculture, and Cindy Waddell, a Micro 2 technologist with the Tennessee Department of Agriculture, testified that Grievant Brousal had had an altercation with them when they cleaned out the break room refrigerator

and mistakenly threw out some food which Grievant had placed in the refrigerator.

38. According to Ms. Shadwick and Ms. Waddell, Grievant Brousal used offensive language with them, "yelled" at them, and used the work "f**king" in "every sentence.[2] Both women stated that they were "offended" by the language Grievant Brousal used.

39. Dr. Brousal testified that he has a Bachelor's degree in Chemistry, a Master's degree in Biochemistry, and a Ph.D. in Pharmacology. He performed six years of post-doctoral work at Vanderbilt University in Cell Biology and Radiation Oncology.

40. Dr. Brousal stated that he has a "personality conflict" with his supervisor, Dr. Chakrabarti.

41. After Dr. Brousal received his August 24, 2006 "written warning", Dr. Brousal asserted that he was removed from a project he was working on, the "Monensin project."[3] Dr. Brousal believed that Dr. Chakrabarti was "retaliating" against him by removing him from the "Monensin project." He explained that the "retaliation" was due to "her [Dr. Chakrabarti] being upset with [him]".[4]

[2] Dr. Brousal later wrote a letter to both women and apologized, stating that "I know the words I spoke were crude and offensive."

[3] The "Monensin project" was a mass-spectrometer project to develop a method to analyze Monensin. "Monensin" is a broad-spectrum antibiotic used chiefly as an additive to beef cattle feed.

[4] Dr. Brousal noted that he did not believe that he was discriminated against because he was in a "protected class," rather, he believed that Dr. Chakrabarti was "biased" against him because he was an "underling." Only statements or acts by supervisors made because of one's age, race, sex or other protected class, are prohibited. Frye v. St. Thomas Health Services, 227 S. W. 3d 595, 602 (Tenn. Ct. App. 2007). "The fact that a supervisor is mean, hard to get along with, overbearing, belligerent or otherwise hostile and abusive, does not violate civil right statutes, unless [it is alleged that such is motivated by discriminatory animus against a protected class]." Id. at 603.

42. Dr. Brousal maintained that he did not say the words "f**k" or "sh*t" to his supervisor, Dr. Chakrabarti, during the March 19, 2008 altercation.

43. However, Dr. Brousal admitted that he told Dr. Chakrabarti, "Please stop bitching at me." He also testified that he said "f*ck me" under his breath where no one could hear him.

44. At the hearing, Dr. Brousal asserted that he did not believe telling a supervisor to "stop bitching at me" was inappropriate.

45. Dr. Brousal went on to say:

> I use language like that all the time. I come from New York City. I use the word "f*ck". I use the word "bitching". I use the word "sh*t". But I do not use them offensively at some person. Its part of my lexicon. I use these words all the time.

46. Dr. Brousal elaborated that he noticed Dr. Chakrabarti's "behavior" increasing every four weeks or so. He made reference to "a woman who's in her menses and having problems." He went on to explain that "specifically the word 'bitch' refers to a female dog."

47. In light of Dr. Brousal's lack of regret over his statements, his refusal to take responsibility for his mistakes or errors in the lab, his pontificating on his 'lexicon" or normal vocabulary, his stating that "I use language like that all the time," and his stated views alluding to his supervisor regarding "behavior" and "a woman who's in her menses and having problems", the evidence preponderates that Dr. Brousal committed acts in violation of Rule 1120-10-.06(2) - Negligence in the performance of duties; and Rule 1120-10-.06(8) -Conduct unbecoming an employee in the State service.

CONCLUSIONS OF LAW

1. The Department bears the burden of proof in this matter to show that Grievant violated the *Department of Personnel Rules* set forth in the letter of suspension without pay. The Department also has the burden of proof to show that the discipline imposed was the appropriate discipline for any violation of such rules.

2. Rule 1120-10.02 of the *Rules of the Tennessee Department of Personnel* provides as follows:

> A career [civil service] employee may be warned, suspended, demoted or dismissed by his appointing authority *whenever legal or just cause exists.* The degree and kind of action is at the discretion of the appointing authority, but must be in compliance with the intent of the provisions of this rule and the Act. An executive employee serves at the pleasure of the appointing authority. (Emphasis added)

3. As defined by the *Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies,* Rule 1360-4-1-.02(7), "preponderance of the evidence" means the greater weight of evidence, or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion.

4. The Department or Petitioner charges Grievant with the following violations: *Rules of the Tennessee Department of Personnel* (Revised May, 1999): Rule1120-10-.06(2) Negligence in the performance of duties, and Rule 1120-10-.06(8) Conduct unbecoming an employee in the State service.

5. T.C.A. §8-30-331 provides that civil service employees (who have successfully completed their probationary period) have a property right to their positions.

6. Because state of Tennessee civil service employees have "property rights" in their jobs, such employees must be afforded constitutional due process before the State may legally take an adverse action against an employee's job. Hinson v. City of Columbia, 2007 WL 4562886 (Tenn. Ct. App. 2007).

7. The requirements for "minimum due process" include proper notice. Sanford v. Tennessee Dept. of Environment, 992 S.W. 2d 410, 414 (Tenn. Ct. App. 1998), *App. for Perm. to Appeal Denied* (Tenn. 1999).

8. If a Grievant is not provided with adequate notice of the charges made against him or her, such a Grievant has been denied due process.

9. T.C.A. §8-30-331 states:

> **Minimum due process.---**(a) Employees who have successfully completed their probationary period have a "property right" to their positions. Therefore, no suspension, demotion, dismissal or any other action which deprives a regular employee of such employee's "property right" will be come effective until minimum due process is provided as outlined below.

10. T.C.A. §8-30-331(b) specifically provides:

> Minimum due process consists of the following:
> (1) The employee shall be notified of the charges. Such notification should be in writing and shall detail times, places, and other pertinent facts concerning the charges.

11. Proper notice, for minimum due process purposes, has been defined as "notice reasonably calculated under all the circumstances to apprise interested parties of the claims of the opposing parties." Gluck v. Civil Service

Commission, 15 S.W. 3d 486, 491 (Tenn. Ct. App. 1999), *App. for Perm. to Appeal Denied* (Tenn. 2000).

12. Procedural due process does not require "perfect, error free governmental decision-making". Qualls v. Camp, 2007 WL 2198334 *4 (Tenn.Ct. App. 2007). However, it does require affording a Grievant a "relatively level playing field in a contested case hearing". *Id.* at 4.

13. By letter of March 24, 2008, Jimmy Hopper, the Director, Division of Regulatory Services, for the Tennessee Department of Agriculture, set forth Grievant's acts which form the basis for the proposed discipline, stated the Rules of the Tennessee Department of Personnel which were violated, noted past discipline of Grievant, and gave notice of Director Hopper's intent to impose a ten day suspension without pay.

14. Director Hopper's March 24, 2008 letter complied with the requirements for minimum due procees.

15. The Department proved, by a preponderance of the evidence, that Grievant was at time careless with his work. In scientific testing for a state laboratory, Grievant's lack of precision, "rushing" his work, and making preventable errors constitutes a violation of Rule 1120-10-.06(2) - Negligence in the performance of duties.

16. The next question which must be asked is whether the Department proved, by a preponderance of the evidence, that Grievant's actions constituted a violation of Rule 1120-10-.06(8) –Conduct unbecoming an employee in the State service?

17. A review of Tennessee statutes, regulations, and case law does not reveal a definition of "conduct unbecoming an employee in the State service."

18. The State produced ample evidence that Grievant used insulting and offensive language to two co-workers, a visitor to the facility, and his supervisor. He behaved in a manner that was repugnant, disrespectful, unprofessional, and rude. His behavior was not in keeping with acceptable workplace conduct toward co-workers or supervisors.

19. Grievant may be a brilliant scientist. Grievant may be from New York City. Grievant may have ideas about the biological functioning of women and its effect on their "behavior". None of these facts excuse Grievant from his offensive, unacceptable conduct in the workplace.

20. Common sense dictates that employees do not enjoy the privilege of cursing or freely stating whatever may be on their minds to their supervisors at work. An employee is not free to curse or insult a supervisor or fellow employee without expecting repercussions.

21. Certain speech is protected speech under the First Amendment of the U.S. Constitution and is protected by the Fourteenth Amendment. Freedom of speech is also protected under Tennessee's Constitution.

22. Every public employee has the right of "free speech" when discussing matters of public concern. Cannon v. Bristol Tennessee Board of Education, 1994 WL 655920 p. 5 (Tenn. Ct. App. 1994). Whether an employee's speech is a matter of public concern is a question of law, which must be resolved on the basis of the content of the speech, the form of speech, and the context of the given statement taken from the record as a whole. Id. At

5, *citing* Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct.1731 (1968). If the speech involved matters of personal interest rather than matters of public concern, the speech is not protected speech. Phillips v. State Board of Regents, 863 S.W. 2d 45, 50 (Tenn. 1993).

23. In order for Grievant to have "freedom of speech", he must demonstrate that his comments in which he used expletives were a matter of "public concern." "Matters of public concern" have been defined as "matters as to which a 'free and open debate is vital to an informed decision-making electorate." Id. At 50, *citing* Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct.1684, 1690 (1983).

24. Applying this "freedom of speech" analysis to Grievant's comments, which consisted of coarse language and expletives, it is clear that Grievant's comments to co-workers, a visitor to the center, and comments to his supervisor involved matters of personal interest rather than matters of public concern. For this reason, Grievant's comments are not "protected speech".

25. At least one court has found that an employee using "foul and disrespectful language" to her supervisor constitutes "conduct unbecoming an employee in state service." *See* Crump v. Tennessee Civil Service Commission, 2000 WL 225575 (Tenn. Ct. App. 2000) [*only Westlaw citation is available*]. In the Crump case, Ms. Crump became upset with her supervisor concerning a notation on a time card, had an altercation with her supervisor in which she shouted "f-you, bitch," and thereafter left the premises. In referring to the language used by the Grievant in the Crump case, the Court of Appeals characterized such language as "foul and disrespectful language." Id. at 2.

26. It is determined that Dr. Brousal's foul and disrespectful language to his supervisor constitutes "conduct unbecoming an employee in state service."

Appropriate Discipline for Grievant

27. Rule 1120-10-10.22 of the *Rules of the Tennessee Department of Personnel* provides as follows:

> A career [civil service] employee may be warned, suspended, demoted or dismissed by his appointing authority whenever legal or just cause exists. The degree and kind of action is at the discretion of the appointing authority, but must be in compliance with the intent of the provisions of this rule and the Act. An executive service employee serves at the pleasure of the appointing authority.

28. Rule 1120-10-.01(45) of the *Rules of the Department of Personnel* provides that causes for disciplinary action fall into two categories:

(1) Causes relating to performance of duties.
(2) Causes relating to conduct which may affect an employee's ability to successfully fulfill the requirements of the job.

29. Grievant's actions/omissions fall within both categories.

30. Tennessee's Civil Service statutes and rules incorporate the doctrine of progressive discipline. Accordingly, state supervisors are expected to administer discipline beginning at the lowest appropriate step. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999).

31. Further, at least one court, in expressing approval of the progressive discipline system, has stated that the legislative mandate for progressive discipline should be "scrupulously followed". Berning v. State of Tennessee, Department of Correction, 996 S.W. 2d 828, 830 (Tenn. Ct. App. 1999).

32. T.C.A. §8-30-330 sets forth the state's civil service progressive discipline system as follows:

> (a) The supervisor is responsible for maintaining the proper performance level, conduct, and discipline of the employees under the supervisor's supervision. When corrective action is necessary, the supervisor must administer disciplinary action beginning at the lowest appropriate step for each area of misconduct.
>
> (b) Any written warning or written follow-up to an oral warning which has been issued to an employee shall be automatically expunged from the employee's personnel file after a period of two (2) years; provided, that the employee has had no further disciplinary actions with respect to the same area of performance, conduct, and discipline.
>
> (c) When corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction or performance. ***Subsequent infractions may result in more severe discipline in accordance with subsection (a).*** (Emphasis added.)

33. The Court in Berning v. State Department of Correction notes that the "key word in the statute [T.C.A. §8-30-330] is *appropriate".* Berning v. State Department of Correction, 996 S.W.2d 828, 830 (Tenn. Ct. App. 1999), *Perm. to appeal denied* (Tenn. 1999). "The language of these provisions does not mandate application of discipline in a routine fashion without regard to the nature or severity of the behavior it is intended to address." Id. At 830, *quoting the chancellor's order with approval.*

34. An employee's prior conduct, both good and bad, along with his entire work history, can be considered when determining what the appropriate disciplinary action should be. Kelly v. Tennessee Civil Service Commission, 1999 WL 1072566 (Tenn. Ct. App. 1999).

35. Grievant has previously received verbal warnings, a written warning, and a memorandum regarding errors or carelessness in his work and his use of offensive language in the workplace.

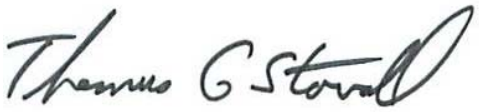
36. The Department has used "progressive discipline" with Grievant.

37. After considering the totality of the circumstances in this matter, it is determined that the appropriate discipline in this matter is a ten (10) day suspension without pay.

37. Grievant is **suspended for ten (10) days without pay.**

It is so ordered.

Entered and effective 4/16/09



Thomas G. Stovall, Director
Administrative Procedures Division